Scottish Elections (Franchise and Representation) Bill

Business and Regulatory Impact Assessment (BRIA)
SCOTTISH ELECTIONS (FRANCHISE AND REPRESENTATION) BILL

BUSINESS AND REGULATORY IMPACT ASSESSMENT (BRIA)

Title of Proposal

Scottish Elections (Franchise and Representation) Bill

Purpose and Intended Effect - Summary

The Scottish Elections (Franchise and Representation) Bill (“the Bill”) sets out a number of changes to the electoral franchise in respect of Scottish Parliament and local government elections in Scotland. It includes provisions extending the electoral franchise for those elections to include all those with a legal right to live in Scotland and extending the right to vote to prisoners sentenced to 12 months or less. This extension will apply in respect of other devolved elections that rely on the local government franchise (currently, elections for membership of a National Park Authority, but the Referendums (Scotland) Bill makes reference to the local government franchise). It also extends candidacy rights for Scottish Parliament and local government elections to foreign nationals with indefinite leave to remain in Scotland.

Background

The Scottish Government is committed to increasing participation in elections both in terms of voter turnout and encouraging citizens to stand for election. Democratic participation challenges the inequalities of power and influence that exist in society. The Bill seeks to ensure an electoral system that supports and empowers the engagement in elections of all those who have chosen to make Scotland their home.

There has been a longstanding¹ prohibition on convicted prisoners voting in all elections in the UK while they are detained in a penal institution. Any convicted person is “legally incapable” of voting at any election while detained in pursuance of their sentence or while unlawfully at large when required to be so detained. This ban applies irrespective of the length of the sentence and applies to all UK elections, including Scottish Parliament and local government elections.

In 2005 the European Court of Human Rights (ECtHR) found in Hirst v UK (No 2)² that the UK blanket ban on prisoner voting was in breach of Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR). This Article provides that member states (of the Council of Europe): “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” This has been interpreted by the courts to give individuals the right to vote and to stand for election. The ECtHR allows member states a wide “margin of appreciation” in relation to the exercise of the franchise by convicted prisoners. This reflects the wide variety of approaches on prisoner voting across the member states of the Council of

¹ Historical background on prisoner voting is summarised in this House of Commons Standard Note: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764#fullreport. A further paper sets out developments since 2015: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7461

Europe. In *Hirst*, the UK’s blanket prohibition on prisoner voting was deemed to be outwith this margin, as it applied to all convicted prisoners, regardless of the nature of their offence or length of their sentence.

**Increased Powers for the Scottish Parliament.**

**Consultation**
The Scottish Government has held two separate public consultation exercises on electoral reform and prisoner voting in relation to Scottish Parliament and local government elections. The consultation on Electoral Reform[^5] was undertaken between December 2017 and March 2018 and a further consultation exercise, on Prisoner Voting[^6], took place from 14 December 2018 to 8 March 2019.

**Extending the franchise to foreign nationals – consultation**
The Scottish Government’s consultation on Electoral Reform revealed that there was general support amongst organisations and individuals to extending the electoral franchise for devolved elections to everyone who is legally resident in Scotland, with 78% of those who responded agreeing to this proposition. Currently, only British, qualifying Commonwealth[^7], Irish and EU citizens are able to vote in devolved elections. The Bill makes no change to the currently unrestricted rights of EU citizens to vote and stand in devolved elections as provided in statute. No legislative change is necessary to secure these voting rights for EU citizens as a result of the UK’s departure from the European Union, but the Scottish Government intends to take this opportunity to restate the whole franchise in primary legislation, while extending it to include all foreign nationals with a legal right to live here. The Scottish Government has previously made a public commitment to ensuring that the rights of EU citizens to vote are protected after Brexit.

**Extending the franchise to certain prisoners – consultation**
The Scottish Government’s public consultation on prisoner voting sought views on the favoured proposal to link voting rights to length of sentence: specifically, to prisoners serving 6 or 12 month sentences. The consultation paper made clear that Scottish Ministers consider that the blanket ban on prisoner voting is not fit for purpose as it is not compatible with human rights law as it applies to Scottish Parliament elections. The consultation paper also sought views on the practicalities of prisoner voting. Responses were received from 35 organisations and 230

[^7]: Under section 4(6) of the Representation of the People Act 1983 a person is a ‘qualifying’ Commonwealth citizen for registration purposes if they do not require leave to enter or remain in the UK or they do require leave to enter or remain in the UK but have been granted such leave or are treated as having been granted such leave. Any type of leave to enter or remain is acceptable, whether indefinite, time limited or conditional.
individuals. Respondents were split fairly evenly across three main positions. Around 3 in 10 thought that prisoners’ right to vote should be linked to the length of their sentence (Option 1). Of the remaining respondents, those who went on to comment generally preferred one of two approaches: allowing no prisoners to vote (around 1 in 3 of all respondents); or extending the franchise to all prisoners (around 3 in 10 of all respondents).

Rationale for Government Intervention

Scottish Ministers consider that the blanket ban on prisoner voting in Scottish Parliament elections is not compatible with human rights law, necessitating a change to the law. It would be possible to legislate on prisoner voting in Scottish Parliament elections in isolation, but Ministers have concluded, on the basis of the Scottish Government’s consultation exercises, to make additional changes to the franchise for foreign nationals, for prisoner voting in local government elections and on candidacy.

Options

To make the necessary changes, primary legislation is required. This is the Scottish Parliament’s first opportunity to introduce this legislation.

Sectors and Groups Affected

This Bill proposes changes to the electoral franchise. The main groups affected are the residents of Scotland who are enabled to vote and stand as candidates, as well as the proposed group of prisoners who will be able to vote.

Allowing persons of all nationalities legally resident in Scotland to vote at Scottish Parliament and local government elections has been estimated to extend the franchise to include over 55,000 non-EU, non-Commonwealth citizens who are currently not able to vote in any elections in Scotland.

Candidacy rights were not a feature of either Government consultation exercise, and the Bill’s proposals are limited to one change to the law on candidacy: to allow all foreign nationals with an indefinite right to live in Scotland to stand as candidates in devolved elections and hold office following those elections. Although foreign nationals with a limited right of residence will be able to vote in devolved elections, a person with a limited right of residence will not be permitted to stand as a candidate.

The changes will affect Electoral Registration Officers and the electoral community, whose staff manage voter registration.

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8 National Records of Scotland publish information on the breakdown of numbers of citizens of non-EU non-Commonwealth countries by local authority area, available at the following link: http://www.scotlandscensus.gov.uk/documents/cde/CT_0202_2011.xlsx
Benefits

This Bill will extend the devolved franchise to citizens of any country who are legally resident in Scotland. It empowers those with the right to reside in Scotland and who may be paying taxes, own or rent a home and/or use public services in Scotland. Up until now, the franchise has been closely based on residence combined with the citizenship of certain countries. The Bill goes beyond the existing arrangement of providing voting rights in devolved elections to EU citizens and qualifying Commonwealth citizens resident in Scotland. The Scottish Government wants Scotland to be a country where every individual who has chosen to live here is equally valued, no matter where they were born. With this in mind, we want to allow all foreign nationals who are legally resident in Scotland to vote at Scottish Parliament and local government elections.

Extending the franchise to foreign nationals from beyond the EU and the Commonwealth is expected to positively impact upon all those resident in Scotland as empowered and valued members of the community. It empowers the engagement in elections of all those who have chosen to make Scotland their home. Enfranchisement of some prisoners is expected to assist with rehabilitation and the wider objectives of the rehabilitation and reintegration of prisoners in order to reduce reoffending.

Costs

The costs associated with the Bill can be separated into these broad categories:

- Electoral management software changes;
- Changes to the online Individual Electoral Registration service;
- Electoral Registration Officers – costs for the registration of new voters; and
- Scottish Prison Service – possible costs to assist in the registration of new voters and the handling of postal votes during an election.

These are all detailed in the Bill’s Financial Memorandum and affect the public sector. There are no additional costs on other bodies, individuals or businesses imposed by this Bill.

Scottish Firms Impact Test

In development of the Government’s consultation papers on Electoral Reform and Prisoner Voting and in the development of policy, we met with a wide range of stakeholders including the Electoral Commission, Electoral Registration Officers, the Electoral Management Board and the Scottish Prison Service. Initial discussions are also taking place with the commercial companies which provide the electoral management systems used by Electoral Registration Officers and local authorities in Scotland. These systems will require adjustment to take account of the changes to the franchise, the costs of which will be met by the Scottish Government.
Competition Assessment

Elections are statutorily managed by Scottish local authorities and overseen by the Electoral Commission, the independent body which oversees elections and regulates political finance in the UK.

Consumer Assessment

The Bill’s proposals would allow all those legally resident in Scotland to vote and stand in Scottish Parliament and local government elections, therefore removing a barrier to those nationals from outwith the EU or Commonwealth countries from being able to vote.

Test Run of Business Forms

New forms will be required to register prisoners who are entitled to vote. These will be produced and tested by the Electoral Commission.

Digital Impact Test

Changes will be required to the online Individual Electoral Registration system and to the electoral registration management software supplied by commercial companies, to ensure that new voters will be able to register. The Scottish Government is working with Electoral Registration Officers, the Cabinet Office and electoral management system suppliers to ensure the necessary changes are in place for the Scottish Parliament elections in 2021.

Legal Aid Impact Test

The Bill has no implications for change to Legal Aid. A person can currently seek legal aid for a petition against an election which will remain unchanged.

Enforcement, Sanctions and Monitoring

The Bill reforms the electoral franchise for Scottish Parliament and local government elections. Existing legislation sets out how and when elections would be conducted. Behaviour which would constitute an offence in an election is also set out in existing legislation.

Implementation and Delivery Plan

The Bill sets out proposed changes to the franchise which are for consideration and scrutiny by the Scottish Parliament. It is proposed that changes to the franchise are made so that they are in place for the next scheduled Scottish Parliament elections in 2021.

Summary and Recommendation

The Bill proposes to extend the franchise to all those legally resident in Scotland and some prisoners. This is in line with wider Scottish Government policy.
**Summary Costs and Benefits Table**

Further information on costs and benefits is available in the Bill’s financial memorandum.

**Declaration and Publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that it represents a fair and reasonable view of the expected costs, benefits and impact of the policy and that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses of Scotland.

**Signed:**

**Date:** 18 June 2019

**Minister’s Name:** Michael Russell MSP

**Minister’s Title:** Cabinet Secretary for Government Business and Constitutional Relations

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